81-2397

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JUN 29 1982
ALEXANDER L. STEVAS,
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

VIRGINIA PRIDDY,

Petitioner,

VS.

H. T. PRIDDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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Questions Presented

1. Whether Petitioner was denied due process of law and the equal protection of the laws because the community estate of the parties was deprived of an interest in the Priddy-Taylor Investments general partnership on the sole grounds that Respondent owned an interest in the partnership prior to the parties' marriage and notwithstanding the community contribution of not less than $331,172.00 (at least 49% of the available community income during the marriage) to the partnership.

2. Whether Petitioner was denied due process of law and the equal protection of the laws by the mischaracterization of certain properties as Respondent's separate prop-erty rather than the parties' community property and, as a result, by the awarding to Respondent of a net separate property estate of a value of not less than $1,150,505.59, and a net community prop-erty award of not less than $365,228.90, while Petitioner was awarded a net separate property estate of a value of $40,438.75 and a net community property award of a negative $19,441.51.

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NO.

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VIRGINIA PRIDDY,

Petitioner

V.

H. T. PRIDDY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner respectfully prays that a writ of certiorari issue from this Court to review the dismissal

without opinion by the Supreme Court of Texas of Petitioner's Application for Writ of Error to review the judgment and opinion of the Court of Appeals for the Second Supreme Judicial District of Texas, Fort Worth, Texas.

Opinions Below

The Supreme Court of Texas' notice of the dismissal without opinion of Petitioner's Application for Writ of Error (App. A), the Judgment and the Opinion of the Court of Appeals for the Second Supreme Judicial District of Texas, Fort Worth, Texas, (App. B and C), and the Judgment and Final Decree of Divorce of the 233rd Judicial District Court, Tarrant County, Texas, (App. D) are all reproduced in the Appendix hereto. Neither the notice, opinions nor judgments are reported or published.

Jurisdiction

On February 24, 1982, the Texas Supreme Court dismissed without opinion Petitioner's timely filed Applicaton for Writ of Error to the Fort Worth, Texas Court of Appeals (App. A-1). A timely Motion for Rehearing was overruled on March 31, 1982 (App. A-2), and this Petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1257(3).

Statutory and Constitutional Provisions Involved

United States Constitution, Fourteenth Amendment, Section One, provides in relevant part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Texas Family Code, Section 3.63(a):

> "In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage."

Texas Family Code, Section 5.02:

> "Property possessed by either spouse during or on dissolution of marriage is presumed to be community property."

Texas Revised Civil Statutes, Article 6132b, Section 28-A, Subsection 2:

> "A partner's interest in the partnership may be community property."

Statement of the Case

This litigation began as a divorce and marital property division case. Respondent sued Petitioner for divorce in the 233rd Judicial District Court, Tarrant County, Texas and Petitioner countersued Respondent in two Counts, one being for divorce (seeking a division of the parties' estate and

reimbursement to the community for community expenditures and for fraudulent transfers to and/or for benefit of Respondent's separate estate and third persons), and the other for actual and constructive fraud, breach of contract and interference with contractual relations. The trial court severed Petitioner's counterclaims for fraud, breach of contract and interference with contractual relations and assigned these claims to a different court. Only the divorce and property division issues were litigated and appealed.

A. The Parties, Their Marriage and Separation

The parties were wed on December 24, 1977, in Fort Worth, Texas. They separated when Respondent left Petitioner in June, 1979. Respondent filed for divorce on June 8, 1979.

Petitioner is a female Mexican national who came to the United States

from Mexico in late September, 1977, to assume the position of Chancellor E (second in charge) of the Consulate of the Republic of Mexico located in Fort Worth, Texas (R. 511-2, 527-8, 567-8). Prior to coming to the United States, Petitioner had been an art teacher, a secretary and, for a short while, a public relations representative (R. 525-527, 553, 560-1). Her grasp of and ability to communicate in the English language is limited (R. 580). An interpreter was used at trial to assist in her examination and testimony. Petitioner has a teenage son from a prior marriage (R. 515). No children were born to or adopted by the parties during their marriage.

Respondent is a businessman. His marriage to Petitioner was his fourth marriage (R. 21-26), his preceding marriage being to a woman named

Lou Ann Priddy, from whom he was divorced in 1976 (R. 23-24, 26). All of his children were from his prior marriages and, at the time of his marriage to Petitioner, all were over the age of majority. (R. 21-24).

Immediately upon the parties' return from their honeymoon, Respondent requested, for the first time, that Petitioner resign her position with the Consulate, promising and representing to take care of Petitioner and her child and stating that she did not need to work (R. 573-74). Petitioner told Respondent that once she resigned, she would be unable to get her job back, but Respondent told her not to worry, that he would take care of Petitioner and her child for the rest of their lives. (R. 32-3, 576). Shortly thereafter, in the presence of the Consulate Director of Mexico and in a sworn statement to an

official of the United States Department of Immigration, Respondent expressly reaffirmed his promise to support and care for Petitioner (R. 578-9, 636-7).

In reliance upon Respondent's promises and representations of support, she resigned her position with the Consulate (R. 573-4). After the parties separated, she did attempt to get her job back, but her requests were refused. (R. 590).

Relying on Respondent's promises and representations, Petitioner did not work for wages during the parties' marriage (R. 518, 547). During this time, she took English courses, secretarial courses and basic accounting courses (R. 518-524).

The parties separated twice, with Respondent leaving Petitioner both times (R. 513, 589, 597). Petitioner articu-

lated at length the specific problems of the marriage including Respondent's failure to communicate with her (especially as to his business activities), his threats, rudeness, lies, heavy drinking, flirtations, extra-marital romantic affairs, frequent traveling, and manipulation of Petitioner (R. 586-592). Petitioner sought out marriage counseling for about eight months beginning in early 1978, but Respondent did not accompany her, nor did she tell Respondent she was seeking a counselor, because she feared Respondent's reaction (R. 590-591). Throughout this period she was trying to keep the marriage together (R. 591). Petitioner denies contributing to the breakup of the marriage (R. 597).

Respondent only testified that there were conflicts in their ways of life and discord in personalities (the basic,

general statutory requirements for a divorce), but was unable to be more specific other than stating there "appeared to be some disagreement about the use of money". (R. 36-7, 39). He admitted that during the parties' marriage he took and paid for several vacations with his previous wife, Lou Ann Priddy, that he was romantically involved with her and that he did not often discuss his business with Petitioner (R. 40, 301-304, 646). It was Respondent who originally filed for divorce.

B. Priddy-Taylor Investments, a Texas General Partnership

At trial, evidence was introduced regarding various properties, real and personal, which Respondent claimed as his separate property. These properties included interests in seven real properties, six businesses, eight insurance

policies and a note receivable. One of the businesses was Priddy-Taylor Investments, a Texas general partnership, in which Respondent claimed to own a 50% interest as his separate property.

Respondent testified that he was a partner in Priddy-Taylor Investments prior to his marriage, owning an undivided 50% interest therein (R. 13, 63, 152). Priddy-Taylor Investments' business involves loaning money, supplying venture capital and speculating in real estate (R. 151, 220). It creates losses to shelter the other income of the partners (R. 671).

The evidence is undisputed and the jury found that not less than $331,172.00 of community funds were contributed as capital to Respondent's partnership account in Priddy-Taylor

Investments (RX-1, 4-7, 10-15, 33, 34, 46; R. 268-277, 622-624, 665-666). Respondent's capital account increased by $171,951.00 between January 1, 1978 (7 days after the parties' marriage) and December 31, 1979 (10 months prior to trial but the most current available evidence).

Respondent, his bookkeeper, Edsel Brooks, and his C.P.A. Ronald Coulson, mistakenly attempted to trace a separate property interest in the Priddy-Taylor Investments partnership entity from the $331,172.00 community contributions by testifying as to specific partnership assets owned or claimed by the partnership and specific partnership liabilities owed by the partnership (PX-6, 24, 35, 36; R. 63-95, 115-6, 120-2, 128-132, 182, 262-4, 283, 329-336, 377-8) and by reciting off of the partnership's unaudited financial state-

ments and tax returns losses sustained by Priddy-Taylor Investments during 1977, 1978 and 1979 (R. 171-4, 437-8, 467-8, 497). They did not, however, attempt to specifically trace the $331,172.00 community contribution after it had been contributed to the partnership. They did not attempt to show that the increase in the capital account is wholly traceable to the capital account as it stood at the time of marriage nor that the current capital account is not represented by any portion of the community contribution nor that the community contribution was entirely lost by partnership transactions.

According to Petitioner's expert witness, George Richard Holmes, C.P.A., of Lawhon, Thomas & Holmes of Dallas, Texas, the $171,951.00 net increase in Respondent's capital account may be

understated because the reserve established in the amount of $101,325.00 for the debt owed Priddy-Taylor Investments by L.C.W. Trucking, Inc. (a corporation in which Respondent owned 25% of the outstanding shares), was not a real bad debt, but rather was a provision for bad debt, that is, an estimation of what might be lost in the future (R. 667-668). In Holmes' opinion, there is a question whether that was a proper write-off under the tax laws since the debt was owing by an affiliate and there appeared to have been some chance of receiving payment on the debt, i.e., the debt was not totally worthless (R. 668-669). There has been at least $30,000.00 repaid on this debt since January 1, 1980 (R. 73-4, 132, 300). Without this write-off, the partnership capital account would be increased by $101,325.00 (R. 669).

A computer lease tax shelter, while providing a benefit to the partnership, also contributed to the fact that Respondent's capital account had increased only $171,951.00 because, being a tax shelter, it creates beneficial losses to the partnership (R. 670). The $171,951.00 increase may also be misleading (on the low side) because of certain oil drilling investment write-offs ($26,000.00 in 1978 and $107,000.00 in 1979, R. 437-8) which the United States Internal Revenue Service permitted to be written-off in the first year of the investment rather than depreciated over time (R. 670). In Holmes' opinion, the purpose of Priddy-Taylor Investments is to create losses to shelter the other income of the partners (R. 671).

In Holmes' opinion, the book value of Respondent's interest in Priddy-

Taylor Investments at the time of trial was at least $360,805.00 (R. 672), an increase of at least $171,951.00 during the parties' marriage. He did not think it possible to give an opinion concerning the present fair market value of Priddy-Taylor Investments, or of Respondent's interest therein, without an MAI appraisal of the various investments, including real estate (R. 672).

Over Petitioner's objections that a proper predicate had not been laid (R. 476-477), Ronald Coulson stated that in his opinion the fair market value of Priddy-Taylor Investments has not increased since December 23, 1977 (R. 477). He admitted, however, that he did not even know the book value, much less the fair market value, of Priddy-Taylor Investments as of the date of his trial testimony because since December 31, 1979, he has not updated the balance

sheet he prepared for Priddy-Taylor Investments (R. 485-7). He admitted that the Equipment Investors III investment of Priddy-Taylor Investments, being a tax shelter giving a write-off over time in excess of the initial investment, constitutes a benefit to Priddy-Taylor Investments in that it creates losses to offset income (R. 501-504). He was unable to specifically state to what extent, if any, various factors would cause a devaluation of the partnership in 1980 (R. 478-9).

C. Trial, Judgment and Appeal

After a ten day jury trial in October, 1980, on December 11, 1980, the trial court entered its Judgment and Final Decree of Divorce (App. D) granting Respondent a divorce from Petitioner. The jury had found that $331,172.00 of community funds were com-

mingled into the Priddy-Taylor Investments partnership. The jury had also found and/or the parties had stipulated that $170,103.43 of community funds were expended as insurance premiums for, mortgage payments (principal and interest) towards and capital contributions to other property found to be Respondent's separate property, and that $4,934.89 of community funds were expended by Respondent on and for the benefit of his former wife, Lou Ann Priddy, and his granddaughter (from a prior marriage).

The trial court entered judgment for Respondent, denied Petitioner's claims of a community interest in the partnership and other businesses of Respondent and denied Petitioner's reimbursement claims (App. D).

In addition to awarding each party the property stipulated by the parties

to be their respective separate property, the trial court found that all of the interests in all seven parcels of real estate, all six businesses (including the Priddy-Taylor Investments partnership), all eight life insurance policies, and the notes receivable constituted Respondent's separate estate, and awarded all of same to him (App. D - 4 through 17). Respondent was assessed $144,403.89 as his separate liabilities (App. D - 17,18). His net separate property award was not less than $1,150,505.59. Petitioner was awarded separate property of a value of $40,438.75. (App. D - 18 through 22).

The trial court's partition of the community estate awarded Petitioner property of a net value of a <u>negative</u> $19,441.51 (App. D - 25,26) and awarded Respondent property of a net value of not less than $365,000.00 (App. D - 22 through 25).

Petitioner duly perfected her appeal from the trial court's Judgment and Decree of Divorce.

On October 28, 1981, the Court of Appeals for the Second Supreme Judicial District of Texas, Fort Worth, Texas filed its Judgment (App. B) and Opinion (App. C) affirming the trial court's Judgment and Decree of Divorce.

The Court of Appeals, contrary to Petitioner's arguments and contentions, held that merely because Respondent's business (including partnership) interests were acquired by Respondent prior to his marriage to Petitioner, they were, therefore, his separate property, notwithstanding the evidence and jury findings as to community contributions to these businesses, including the $331,172.00 contributed to the Priddy-Taylor Investments partnership

(App. C - 6). The Court of Appeals did not address many of Petitioner's points of error presented to it, most notably the reversible error committed by the trial court in failing to partition all of the community property presented before it for partition.

On November 11, 1981, Petitioner filed her Motion for Rehearing which was overruled without opinion by the Court of Appeals on November 25, 1981.

A timely filed Application for Writ of Error was filed in the Supreme Court of Texas, raising all issues presented to the Court of Appeals. This Application was dismissed, without opinion, for want of jurisdiction on February 24, 1982 (App. A-1). On March 31, 1982, Petitioner's timely filed Motion for Rehearing of that dismissal was overruled, without opinion, by the Texas Supreme Court (App. A-2).

Reasons For Granting the Writ

This case presents several issues of public importance, including significant federal constitutional due process and equal protection issues. The first such issue is whether, under Texas law, the community estate of a husband and wife may be deprived of an interest in a general partnership into which nearly 50% ($331,172.00), if not more, of the community's available income was contributed for the support and maintenance of the business, upon the mere showing by the husband that he owned an interest in the partnership prior to the marriage. Contrary to the decisions this case, the San Antonio, Texas Court of Appeals in Cox v. Cox, 439 S.W.2d 862 (Tex.Civ. App.-San Antonio 1969, no writ), on identical facts, held that the mere showing of a pre-marital partnership interest is not sufficient to trace the

partnership interest as entirely one spouse's separate property when community contributions have been made. Other Texas cases, e.g., Smoot v. Smoot, 568 S.W.2d 177 (Tex.Civ.App.-Dallas 1978, no writ), and leading Texas commentators, e.g., Bromberg, Source and Comment to TEX.REV.CIV.STAT.ANN. art. 6132b, § 28-A at p. 367 (1970), also contradict the decisions in this case on this issue. Thus, there is neither a fair nor substantial basis in precedent Texas law supporting the ruling of the courts in this case and the unpredictable reversal of precedent Texas law, thus presenting a federal question for determination by this Court, Hughes v. Washington, 389 U.S. 280, 296, 88 S.Ct. 438, 19 L.Ed. 2d 530 (1967) (Stewart, J. concurring), Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944). This error

deprived Petitioner of substantial community property rights without due process of law and denied Petitioner the equal protection of the laws, Id. It would seem that there can be no doubt that the interpretation in this case of Texas community property laws, in light of the Cox and Smoot decisions, is incorrect and unconstitutional in the manner in which it occurred. If allowed to stand and if followed by other courts, that interpretation would not only change well-established Texas community property law without notice or a substantial basis, but would also seriously undermine the rights and ability of a spouse in every community property state in the nation to be protected against the other spouse's use of enormous amounts of community property to foster and benefit his own businesses and separate property to the

detriment of the community and the first spouse; it would, at the very least, contribute an element of confusion and uncertainty in similar cases.

The second significant issue is whether, under the facts of this case, the mischaracterization of the Priddy-Taylor Investments partnership as entirely Respondent's separate property constitutes an unconstitutional deprivation of Petitioner's "just and right" share of the community estate as mandated by TEX. FAMILY CODE ANN. § 3.63 (1975).

The granting of this Petition for Certiorari is, therefore, strongly supported by the considerations referred to in Rule 19 of the Rules of this Court.

I. The San Antonio, Texas Court of Appeals' decision in Cox v. Cox, 439 S.W.2d 862 (Tex.Civ.App.-San Antonio 1969, no writ), clearly shows error of constitutional dimensions was committed

in this case by the community estate of the parties being deprived of an interest in the Priddy-Taylor Investments partnership merely because Respondent owned an interest in the partnership prior to the parties' marriage and notwithstanding the community contribution of not less than $331,172.00 to the partnership.

The evidence is undisputed (RX-1, 4-7, 10-15, 33, 34, 46; R. 268-277, 622-624, 665-666) and the jury found that not less than $331,172.00 of community funds was contributed as capital to Respondent's partnership account in Priddy-Taylor Investments. This figure may even have been greater as Respondent testified that, as to any other funds contributed to the partnership, he cannot differentiate between contributions and loans because there are too many transactions to remember (R. 625).

There is no evidence that during the parties' marriage Respondent received a salary or distributions of

earnings or profits for his toil, talent and labor contributed to the partnership. This fact is significant because the existence of such uncompensated toil, talent and labor affects the determination of the separate and community nature of the partnership interest, and, unless clearly and convincingly traced out, effects the interest as being entirely community in nature, Norris v. Vaughan, 152 Tex. 491, 260 S.W.2d 676 (1953), McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976), In Re Marriage of Higley, 575 S.W.2d 432 (Tex.Civ.App.-Amarillo 1978, no writ), Smoot v. Smoot, 568 S.W.2d 177 (Tex. Civ.App.-Dallas 1978, no writ), and TEX.REV.CIV.STAT.ANN.art. 6132b, §28-A, Comment by Alan R. Bromberg at page 367 (1970).

Without a reasoned, fair or substantial basis, Demorest v. City Bank

Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed 526 (1944), and in an unpredictable reversal of relevant precedents, Hughes v. Washington, 389 U.S. 290, 296, 88 S.Ct. 438, 19 L.Ed. 2d 530 (1967) (Stewart, J. concurring), the courts in this case, ignored the fact that the community contributed not less than $331,172.00 to Respondent's partnership capital account, ignored the uncompensated toil, talent and labor contributed by Respondent to the partnership, and relieved Respondent of his burden to clearly and satisfactorily trace and resegregate his pre-marital partnership interest in his capital account from the present partnership capital account into which the community contributions were commingled. Cf., McKnight, supra., Smoot, supra., Cox v. Cox, 439 S.W.2d 862 (Tex.Civ.App.-San Antonio 1969, no writ), TEX.REV.CIV.

STAT.ANN. art. 6132b, §28-A (1970) (hereinafter "the Partnership Act") and Comment thereto by Alan R. Bromberg at page 367. A federal question is thus presented for determination by this Court, Hughes, supra.

As was the situation in McKnight, Smoot and Cox, the Priddy-Taylor Investments partnership is a post-Partnership Act partnership (PX-42), under which Act a partner's interest can be community property, TEX.REV.CIV.STAT.ANN. art. 6132b, §28-A (1970), for example by the contribution of community property thereto, Smoot, supra., 568 S.W.2d at 180 ("if a married partner contributes community property. . . .then, to that extent, his interest is community property"). Since Respondent claims a separate property interest in 50% of the partnership represented by a capital account into

which the community has made contributions (which 50% interest is presumed to be community property regardless of the contributions, TEX.FAMILY CODE ANN. §5.02 (1975)), it was encumbent upon Respondent to clearly and satisfactorily trace, identify and resegregate that portion of the presumptively community interest in the partnership which he claims as his separate property, McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973), Tarver v. Tarver, 394 S.W.2d 780 (Tex.1965). To do this, he had to clearly and satisfactorily show his specific pre-marital partnership interest (i.e., his capital account as it stood on December 23, 1977) and trace and separate all partnership transactions involving that pre-marital account during the parties' marriage and those involving the community contributions. Courts in this case departed from

established Texas law and held that he had no such burden, or alternatively, and by implication that he satisfied such burden.

Respondent has not shown that the $331,172.00 of community funds contributed to the partnership were entirely lost by partnership transactions nor that the increase of Respondent's capital account to $360,805 as of December 31, 1979 (PX-59; RX-33, 46; R. 467-8, 487, 497, 672) is wholly traceable to the $188,854.00 account as of December 31, 1977 (RX-35,46; R. 665). He has not proved that the current capital account is not represented by any portion of the $331,172.00 community contributions nor attributable to his time, toil and labor contributed to the partnership during the parties' marriage. Thus, Respondent has failed to clearly and convincingly resegregate a separate property capital

account from the community's contributions, and thus has failed to overcome the presumption that the community estate of the parties owns an undivided 50% interest in Priddy-Taylor Investments. Therefore, the entire interest is not the separate property of Respondent.

The rulings of the courts in this case holding that the Priddy-Taylor Investments partnership is Respondent's separate property solely because he first acquired an interest therein prior to his marriage to Petitioner and notwithstanding the community contribution of not less than $331,172.00 to the partnership is in direct conflict with the holding in Cox, supra., and with the rule of law announced in Smoot, supra., 568 S.W.2d at 180. The Cox decision, upon the exact same state of facts as the present case, held that the trial

court committed reversible error in determining that the community owned no interest in the partnership. The Cox court held that the fact that a partnership interest is shown to have first been acquired prior to the marriage is not determinative, in and of itself, of its being entirely separate property (as the courts in this case have held), and is not, in and of itself, sufficient tracing to overcome the statutory presumption that the entire interest is community property. Had the Cox panel heard this appeal they would have held that the trial court in this case likewise committed reversible error in holding that the community owned no interest in the Priddy-Taylor Investments partnership, or else would have had to overrule their prior decision in Cox. The courts in this case stated no reasoned nor substantial basis

for this unpredictable departure from Cox, nor for relieving Respondent of his tracing burden and depriving the community estate of the parties of an interest in the partnership, Hughes v. Washington, 389 U.S. 290, 296, 88 S.Ct. 438, 19 L.Ed.2d 30 (1967) (Stewart, J. concurring), Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526 (1944).

The decision of the Dallas Court of Civil Appeals in Smoot v. Smoot, 568 S.W.2d 177 (Tex.Civ.App.-Dallas 1978, no writ), is also relevant to the consideration of this appeal. In Smoot, the Dallas Court of Civil Appeals was faced with the issue of determining whether a partnership interest was community property or separate property. As in the instant case and as in Cox, Smoot involved a post-Partnership Act

partnership formed after the parties' marriage. As in Cox, the date of inception of the partnership interest was not, of itself, determinative of the community or separate nature of the partnership interest, as the courts in this case have held. To determine the nature of the interest, the court in Smoot required the tracing of the sources of the contributions to the partnership. In Smoot, unlike the instant case, the only contribution was husband's separate property. The Court determined that there was no community interest in the partnership because there was no contribution of community property, whether by way of direct contributions as is the situation in the instant case, or by retained profits or assets derived from partnership profits, or by uncompensated labor and efforts beyond that required for preservation of

the separate property. In making its analysis and determination that the sole capital investment in the partnership was husband's separate property, and that therefore the partnership interest was husband's separate property, the Smoot court stated:

> "The community or separate nature of each partner's interest depends on the source of the property. If a married partner contributes community property or if partnership assets are accummulated in rents or profits, then, to that extent, his interest is community, even though such rents or profits may have resulted from the use of separate property. See Hardee v. Vincent, 136 Tex. 99, 147 S.W.2d 1072, 1073-74 (1941)." 568 S.W.2d at 180 (emphasis added).

Both Cox and Smoot show that the error of constitutional dimensions was committed by the holding that Priddy-Taylor Investments is entirely separate property and by the failure to divide the community interest in Priddy-Taylor Investments. The

rationale of Cox and Smoot, as well as of §28-A of the Partnership Act, is that an interest in a partnership is not immutable, that capital contributions purchase additional interests (or in other words, increase the interest of the contributing estate) just as if the contributing estate was purchasing stock in a corporation which, if purchased by community property, would undisputably be community property.

The courts' error in this case reverses the rule of law set forth in Cox, supra., finds neither a fair nor substantial basis in precedent Texas law and deprives Petitioner of significant community property rights without due process of law and in denial of the equal protection of the laws. A question for determination is, therefore, presented to this Court, Hughes v. Washington, 389 U.S. 290, 296, 88 S.Ct.

438, 19 L.Ed. 2d 530 (1967) (Stewart, J. concurring). If allowed to stand, that interpretation of community property law would not only change well-established Texas law without notice or a substantial basis, but would also seriously undermine the rights and ability of a spouse in every community property state in the nation to be protected against the other spouse's use of enormous amounts of community property to foster and benefit his own businesses and separate property to the damage of the community and the rights of the first spouse. At the very least, it would contribute an element of confusion and uncertainty in similar cases.

II. By mischaracterizing the Priddy-Taylor Investments partnership as entirely Respondent's separate property, Petitioner was deprived of her "just and right" share of the community estate as mandated by TEX. FAMILY CODE ANN. § 3.63 (1975).

The mischaracterization of the Priddy-Taylor Investments partnership as entirely Respondent's separate property resulted in the failure to divide the parties' interest in the partnership as was required to be done, Hailey v. Hailey, 160 Tex. 372, 331 S.W.2d 299 (1960), resulting in Petitioner's being deprived of her "just and right" share of the entire community estate as mandated by TEX. FAMILY CODE ANN. § 3.63 (1975).

The fact that the trial court's Judgment and Decree of Divorce awarded between the parties all items of property introduced before the court does not mean that the trial court partitioned all of the parties' community property. To partition community property, the trial court must first have found an item to have been community property, unless, perhaps, if community

property mischaracterized as separate property is awarded to a party "as if it were such party's separate property." Bell v. Bell, 513 S.W.2d 20 (Tex. 1974), Smith v. Smith, 620 S.W.2d 619 (Tex.Civ.App.-Dallas 1981, no writ). In the latter instance, the appellate courts are reluctant to second guess the lower court's judgment and assume that the lower court did not consider the property as community property in its mandatory partition of the community estate. But where, however, as is the case here, mischaracterized property is not awarded "as if it were a party's separate property", but instead, as follows:

> "The following property is recognized as being the separate property of [Respondent] and [Respondent] is awarded the following as [Respondent's] sole and separate property, and it is hereby determined that [Petitioner] does not now nor has she ever had any interest in and to the following

> separate property of [Respondent] . . .," (App. D-4),

there can be no doubt but that the trial court failed to partition all of the community property when mischaracterized community property is listed in the list of properties following the above-quoted portion of the trial court's judgment, as was the partnership interest (App. D-13). This conclusion is reinforced by the language used by the trial court in its partition of the properties it determined were community property:

> ". . .[The specified party] is awarded the following as [such party's] sole and separate property and [the other party] is hereby divested of all right, title and interest in and to such property . . ." (App. D-22, 23,25).

An appellate court does not have to second guess the trial court. From the face of the trial court's Judgment and Decree of Divorce it is apparent that

the trial court clearly did not consider and partition the entire community estate as mandated by the Texas legislature, TEX. FAMILY CODE ANN. § 3.63(a) (1975). This constitutes reversible error, Hailey v. Hailey, 160 Tex. 372, 331 S.W.2d 299 (1960), and a deprivation of property without due process of law and in violation of the equal protection of the laws.

Having erroneously concluded that the community owned no interest in the partnership, it is apparent from the face of the trial court's judgment that the trial court never considered dividing the community's interest in the partnership, as it found that only one party (Respondent), not the parties, owned an interest in the partnership and automatically, reflexibly and without further consideration, awarded that interest wholly and solely to Respondent

as the trial court did with all other properties found to be Respondent's separate property. Respondent's argument that it should be presumed that the trial court considered that it had the right to award all or some of the partnership interest to Petitioner if it felt it to be necessary to effect a fair and just division of the property is simply incredible. Obviously, from the face of the judgment, the trial court was not going to divest any party of property found to be that party's separate property.

Had the trial court correctly characterized the partnership interst as community property and, in its division of that interest, awarded it wholly to Respondent, clearly the division of the parties' estate would not be fair, equitable, just and right. See In Re Marriage of York, 613 S.W.2d 764, 771

(Tex.Civ.App.Amarillo 1981, no writ), Jensen v. Jensen, 629 S.W.2d 222 (Tex. Civ.App.-Tyler 1982, no writ history of record).

Excluding the partnership interest for the time being and based upon values of those assets and liabilities which were in evidence (using depreciated book values as stated by Respondent's bookkeeper and other values which were stated as not being current through the date of trial, but without waiving any of Petitioner's objections to any of said evidence being competent evidence of the fair market value at the time of trial of any of these assets and without waiving any of Petitioner's assignments of error as to the trial court's and Court of Appeals' mischaracterization of other properties as Respondent's separate property), the total value of properties found to be Respondent's

separate property and awarded wholly and solely to him is not less than $1,294,910.00. The separate liabilities declared to be Respondent's totaled $144,404.41, leaving Respondent with a net separate estate awarded him of the value of $1,150,505.59.

On the other hand, the trial court's judgment awarded Petitioner a net separate estate of the value of $40,438.75.

Using only the values of community assets and liabilities as are in evidence, the value of the community property awarded Respondent was $507,227.90. The total community liabilities imposed upon Respondent (excluding attorneys' fees) was $141,999.00. The net community estate awarded Respondent according to the valuations shown above is $365,228.90.

On the other hand, the net community estate awarded Petitioner was of a value of a negative $19,441.51.

The trial court's division (and the upholding thereof by the appellate courts) of the community and respective separate estates of the parties is even more offensive when considering the testimony concerning the relative abilities of the parties and Respondent's fault in the breakup of the marriage, Jensen v. Jensen, 629 S.W.2d 222 (Tex.Civ.App.-Tyler 1982, no writ history of record), Coote v. Coote, 592 S.W.2d 52 (Tex.Civ.App.-Fort Worth 1979, writ re'd. n.r.e.), Cooper v. Cooper, 513 S.W.2d 229 (Tex.Civ.App.-Houston [1st Dist.] 1974, no writ). This testimony is detailed in the Statement of Facts, supra., pp. 5-10. Under this state of facts, had the trial court correctly found a community interest in

the partnership but still awarded it wholly and solely to Respondent, the gross injustice described above would have been exacerbated to the tune of not less than $504,210.00, which is the "assets over liabilities" value (not even the fair market value) of a 50% interest in the partnership at the time of trial. This figure is based upon whatever testimony was offered as to the value of the assets and amount of the liabilities (without, however, waiving any objections to the sufficiency of such evidence). In other words, had the partnership interest been properly characterized, the parties' entire community estate would have had to have been divided in a different manner so as to be just and right, with Petitioner receiving significantly more than a net community award of a <u>negative</u> $19,441.51. Petitioner has never

asserted that the division must be equal; she only asserts that the entire estate of the parties must be divided in a just and right way having due regards for the rights of both parties. See In Re Marriage of York, 613 S.W.2d 764 (Tex.Civ.App.-Amarillo 1981, no writ), Jensen v. Jensen, 629 S.W.2d 222 (Tex.Civ.App.-Tyler 1982, no writ history of record).

Therefore, as a result of the unconstitutional mischaracterization of the Priddy-Taylor Investment partnership, Petitioner was deprived of her "just and right" share of all of the community property of the parties to which she was entitled under Texas law. She was thus denied substantial property rights in a manner manifestly unjust and unfair, contrary to Texas law and in violation of her federal constitutional rights to due process of law and the equal protection of the laws.

Conclusion

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Edwin Tobolowsky
Peter M. Gross
TOBOLOWSKY & SCHLINGER, P.C.
1900 Southland Center
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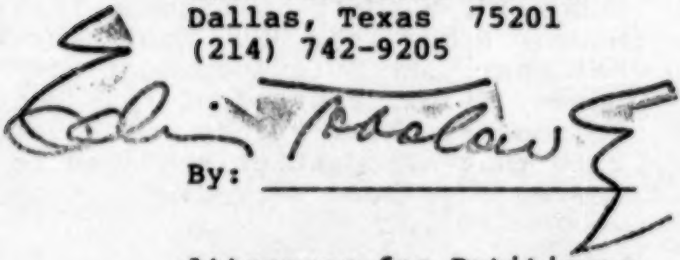
(214) 742-9205



By: _____

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Edwin Tobolowsky, a member of the United States Supreme Court bar, do hereby certify that on the 29th day of June, 1982, three copies of the Petition for Writ of Certiorari to the Supreme Court of Texas in this cause was served upon Respondent in accordance with the Rules of this United States Supreme Court by depositing same in a sealed envelope, postage prepaid, certified mail, return receipt requested, addressed to Rick G. Sorenson, Esq., McDonald, Sanders, Ginsberg, Phillips, Maddox & Newkirk, 2900 Continental National Bank Building, Fort Worth, Texas, 76102, counsel of record for Respondent, H.T. Priddy. I further certify that all parties required to be served have been served.

Edwin Tobolowsky

APPENDIX

APPENDIX A-1

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

February 24, 1982

Dear Sir:

You are hereby notifed that the Application for Writ of Error in the case of PRIDDY v. PRIDDY, No. C-938 was this day dismissed for want of jurisdiction.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX A-2

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

March 31, 1982

Dear Sir:

You are hereby notifed that the Motion for Rehearing in the case of PRIDDY v. PRIDDY, No. C-938 was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX B

JUDGMENT

Virginia Priddy	) From the District
	) Court of Tarrant
	) County
	) (233-2300)
18564 vs.	)
	)
	) October 28, 1981
H.T. Priddy	) Opinion by
	) Justice Brown

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellant, Virginia Priddy, and her surety, Lawyers Surety Corporation, pay all costs in this behalf expended, for which let execution issue, and that this

decision be certified below for observance.

APPENDIX C

NO. 18564

IN THE COURT OF APPEALS FOR THE

SECOND SUPREME JUDICIAL DISTRICT

OF TEXAS

VIRGINIA PRIDDY APPELLANT

VS.

H. T. PRIDDY APPELLEE

FROM THE DISTRICT COURT OF
TARRANT COUNTY

OPINION

This is a divorce and property settlement case. H.T. Priddy (appellee) and Virginia Priddy (appellant) were married on December 24, 1977. Eighteen months later, in June of 1979, appellee filed for divorce. Appellant counter-petitioned for divorce in July 1980.

The parties had ceased to live together as husband and wife as of October 1979.

Appellee is 63 years old with no more than a seventh grade education. However, he is and has been in extensive business dealings and partnerships since before his marriage to appellant.

Appellant is a 36 year old Mexican National. She completed high school and one year of law school in Mexico. At the time of marriage to appellee she was employed by the Mexican Consulate in Fort Worth, but quit her job upon marriage. Since her marriage she has taken various educational courses to increase her vocational and language skills.

In her countersuit appellant not only sued for divorce, but also sued for actual and constructive fraud, breach of contract and interference with contrac-

tual relations by appellee. The trial court severed all claims but the divorce action and assigned them to a different court. Trial was to a jury which answered the special issues favorably to the appellee. The trial court divided the property based on the jury's verdict and entered judgment thereon. From this judgment Virginia appeals.

We affirm the judgment of the trial court.

Appellant brings before this court seventy-two points of error for review. This plethora of asserted error can be condensed into a few general areas: mischaracterization of certain property by the trial court; failure of the trial court to award reimbursement to the community estate; no or insufficient evidence to support the jury's findings; error in submission of certain special

issues; and error in severing appellant's claim for damages arising from fraud, breach of contract and interference with contractual relations.

The statute that dictates the principles for division of property in divorce cases states that:

> "In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage."

TEX. FAMILY CODE ANN. § 3.63 (1975). In other words, the trial court is statutorily vested with broad discretion in the division of property between the parties to a divorce. In the case of Bell v. Bell, 513 S.W.2d 20,22 (Tex. 1974), the Supreme Court of Texas

interpreted the above statute and stated:

> "Texas courts have held that such division does not have to be equal, and appellate courts have held it must be presumed that the trial court exercised its discretion properly, and that a case should be reversed only where there is a clear abuse of discretion."

It is in the light of this mandate and fundamental tenet that we consider the case before us.

Appellant contends that the trial court mischaracterized certain property as the separate property of appellee. We disagree. H.T. Priddy testified at trial that prior to his marriage to appellant he had accumulated interests in several corporations and partnerships. The jury found that he had

acquired these interests prior to his marriage to Virginia. Based upon the jury's findings the trial court characterized these interests as appellee's separate property. Appellant cites as error the trial court's submission of the issues on a "preponderance of the evidence" burden of proof instead of a "clear and convincing" standard. Appellee urges that the issues shoud not have been submitted at all because they were conclusively established by the evidence, or alternatively, that the correct standard was submitted to the jury. Error, if any, in this submission was harmless because the evidence conclusively showed that these interests were acquired prior to marriage. Therefore, these interests were appellee's separate property under TEX. FAMILY CODE ANN. § 5.01 (1975).

Appellant seeks reimbursement from appellee to the community estate for her

contributions to appellee's business interests. The right of reimbursement is an equitable right that may be considered by the trial court in its division of property. Harrell v. Harrell, 591 S.W.2d 324 (Tex.Civ.App.-Corpus Christi 1979, no writ); Horlock v. Horlock, 533 S.W.2d 52 (Tex.Civ.App.-Houston [14th Dist.] 1975, writ dism'd). For a reimbursement claim to be granted it must be shown that the separate property, here the appellee's business interests, were enhanced by the community contribution. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (Tex. 1935); Pruske v. Pruske, 601 S.W.2d 746 (Tex. Civ.App.-Austin 1980, writ dism'd). There was testimony at trial that each venture appellee was involved and had continued to lose money and was worth less at the time of trial than at the time of marriage. From this evidence,

the jury found that the business interests had not benefited from the community contribution. Accordingly, the trial court refused to grant appellant's claim for reimbursement. There was no abuse of discretion in the trial court's refusal to award reimbursement.

Appellant raises no evidence or insuffient evidence points on many of the jury's responses to special issues. After reviewing the voluminous record of this case, containing almost three weeks of testimony and one hundred and eleven exhibits, we find sufficient evidence to support the jury's findings.

Finally, appellant argues that her countersuit for fraud and tortious interference with contractual relations should not have been severed from her counter-petition for divorce. We

overrule this point. For severance to be proper the controversy must contain two distinct and separate causes of action, each capable of supporting an independent lawsuit. Kansas University Endowment Ass'n v. King, 162 Tex. 599, 350 S.W.2d 11 (Tex. 1961); Ramirez v. Johnson, 601 S.W.2d 149 (Tex.Civ.App.-San Antonio 1980, writ ref'd n.r.e.). Appellant's claim for damages arising out of alleged fraud and tortious interference with contractual relations were clearly distinct and matintainable independent of her divorce action. The trial court has broad discretion in this area and its order of severance will not be disturbed without a clear showing of abuse of discretion. Nueces City Hosp. Dist. v. Tex Health Facilities, 576 S.W.2d 908 (Tex.Civ.App.-Austin 1979, no writ); Sheppard v. Citizens Nat. Bank of Austin, 567 S.W.2d 613 (Tex.Civ.App.-Austin 1978, writ ref'd n.r.e.).

Considering the relative position of the parties before and after this eighteen month marriage, we are unable to find a clear abuse of discretion, as we must in order to reverse the property division made by the trial court. McKnight v. McKnight, 543 S.W.2d 863 (Tex. 1976); Bell v. Bell, supra.

We have considered all seventy-two points of error; all are overruled.

The judgment of the trial court is affirmed.

/s/ RICHARD LEE BROWN, JUSTICE

HUGHES, JORDAN, BROWN, J.J.

NOT FOR PUBLICATION

TEX. R. CIV. P. 452

Oct 28 1981

APPENDIX D

NO. 233-2300

IN THE MATTER OF THE MARRIAGE OF	)	IN THE DISTRICT
	)	
	)	COURT OF
H.T. PRIDDY	)	
	)	TARRANT COUNTY,
AND	)	TEXAS
	)	
VIRGINIA PRIDDY	)	233 JUDICIAL DISTRICT

JUDGMENT AND DECREE OF DIVORCE

The above entitled and numbered cause came on regularly for trial on October 1, 1980. Petitioner and Counter-Respondent, H.T. Priddy (hereinafter referred to as Petitioner), and Respondent and Counter-Petitioner, Virginia Priddy (hereinafter referred to as Respondent), appeared in person and by their attorneys. A jury of twelve persons was duly accepted, impaneled, and sworn to try the action.

After hearing the evidence, arguments of counsel and instructions of the

Court, the special issues were submitted to the jury. On October 21, 1980, the jury returned its special verdict. On the basis thereof, together with stipulations of fact, and after the Court's examining the pleadings and listening to the evidence and argument of counsel, the Court issues this Judgment and Decree of Divorce.

The Court finds that it has jurisdiction over this cause and the parties, and that Petitioner's Original Petition for Divorce has been on file in this Court for at least sixty (60) days.

The Court finds that at the time this suit was filed, Petitioner had been a domiciliary of this state for the preceding six (6) months and a resident of this county for the preceding ninety (90) days.

All persons entitled to citation were properly cited. A record of testimony and evidence before the Court was made. The Court is of the opinion that the material allegations in the Petitioner's Second Amended Original Petition together with its Inventory and Appraisement and Supplement and Correction of the Inventory and Appraisement and Trial Amendment to Inventory of H.T. Priddy are substantially correct and have been proved by the standard of evidence required by law. The Court finds that a divorce should be granted on the grounds of insupportability.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the bonds of matrimony between the Petitioner, H.T. Priddy, and Respondent, Virginia Priddy, be and they are hereby dissolved, and a decree of

divorce is hereby granted to H.T. Priddy.

The Court finds that the parties are not now expecting a child of the marriage, and that no children were born as issue of this marriage.

The Court finds that this Judgment and Decree of Divorce is in all respects just and right, having due regard for the rights of each party.

The following property is recognized as being the separate property of the Petitioner and the Petitioner is awarded the following as Petitioner's sole and separate property, and it is hereby determined that Respondent does not now nor has she ever had any interest in and to the following separate property of Petitioner:

1] Note receivable from Jack

Hines, executed September 2, 1977 in the original pricipal amount of $17,000.00, made payable to H.T. Priddy, Jr., and secured by all of Lots 1 and 2, Block 17 of K.N. VanZandt's Second Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in volume 106, page 118, Plat Records, Tarrant County, Texas pursuant to Vendor's Lien and Deed of Trust recorded in volume 2949, page 714 of the Deed of Trust Records of Tarrant County, Texas.

2] Twenty-five percent (25%) of the common stock of DETA, U.S.

3] All property interest in Southland Life Insurance Policy No. 381069, Policy No. 381070, and Policy No. 381071.

4] All property interest in Manhattan Life Insurance Policy No. 620616.

5] All property interest in Pan American Life Insurance Policy No. 346222.

6] All property interest in Moslah Benefit Fund Policy No. H-287.

7] All property interest in Ohio National Life Insurance Policy No. 343157.

8] All property interest in Pioneer American Life Insurance Policy No. 374175.

9] Real property located at 700 Oakmont Lane North, Fort Worth, Tarrant County, Texas, more particularly described as Lot 3, Block 20, Woodhaven Country Club Estates, Fifth Filing, an addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in volume 388-sixty-one, page 60, Deed Records of Tarrant County, Texas as described in that Warranty Deed (with Vendor's Lien) recorded in volume 6223, page 695 of the Deed Records of Tarrant County, Texas, SUBJECT TO the existing mortgage on said residence, as held by United Savings of Texas, Fort Worth, Tarrant County, Texas.

10] Real property located on Avenue L, Fort Worth, Tarrant County, Texas, more particularly described as Lot 12, Block 1, South Eastlawn Addition to the City of Fort Worth, Tarrant County, Texas, according to the plat recorded in volume 1576, page 236, of the Deed Records of Tarrant County, Texas, as described in Warranty Deed recorded in volume 4261, page 79, of the Deed Records of Tarrant County, Texas.

11] Real property located on Calhoun Street, Fort Worth, Tarrant County, Texas, more particularly described as Lot 8, Block E-5, Daggetts Addition to the City of Fort Worth, Tarrant County, Texas, and a

tract of land adjoining Lot 8 on the North, together with a tract of land out of Block E-6, Daggetts Addition to the City of Fort Worth, Tarrant County, Texas, being 48 x 100 feet, and all being more particularly described in that Warranty Deed from H.T. Priddy Properties, Inc. to H.T. Priddy, dated July 30, 1974, recorded in volume 5687, page 781, of the Deed Records of Tarrant County, Texas, together with any and all rights of H.T. Priddy as lessee of such real property to Allright Parking Corporation under that lease agreement dated January of 1978.

12] Lot 7, Block 2, Rosedale Park Addition to the City of Fort Worth, Tarrant County, Texas, according to plat recorded in volume 388-B, page 267, Deed Records of Tarrant County, Texas, as described in that Warranty Deed recorded in volume 4628, page 418 of the Deed Records of Tarrant County, Texas.

13] Lot 8, Block 2, Rosedale Park Addition, Tarrant County, Texas, as described in that Warranty Deed recorded in volume 6167, page 523, of the Deed Records of Tarrant County, Texas.

14] That mineral estate reserved by H.T. Priddy, Jr. in that certain 214.05 acre parcel of

land, same being in part of the J.D. Jameson Survey, Abstract No. 294, Hood County, Texas, as reserved in that Warranty Deed from H.T. Priddy, Jr. to A.E. Taylor, Jr. executed August 28, 1978 and recorded in volume 309, page 273, of the Deed Records of Hood County, Texas.

15] Real property located on Nixon Street, Fort Worth, Tarrant County, Texas, more particularly described as a portion of Lot 19, Block 4, Greenway Place East, an addition to the City of Fort Worth, Tarrant County, Texas, described by metes and bounds in that Warranty Deed (with Vendor's Lien) from the First National Bank of Fort Worth to H.T. Priddy, Jr. and A.E. Taylor executed August 20, 1970, as recorded in volume 4922, page 48, of the Deed Records of Tarrant County, Texas.

16] The following items of personal property located at the residence at 700 Oakmont Lane North, Fort Worth, Tarrant County, Texas:

a. Two (2) blue and white Porcelain dove statuettes;
b. Glass figurine of a fish;
c. Glass figurine of a dog;
d. Round plastic figure with sea shell inside;
e. Three (3) small angel

figurines in gold rimmed cylinder;

f. Fish figurine on bronze and black base;
g. Several vases;
h. Lennox china plate;
i. Three (3) glass figurines (lawyer, doctor, businessman);
j. Realistic sta.-200 stereo system, including AM/PM receiver, two (2) speakers and record player;
k. Records;
l. Various paintings and pictures, excluding those painted by Respondent;
m. Portrait of H.T. Priddy;
n. Two (2) plastic bookholders;
o. Two (2) figurines of owls;
p. Backgammon table with two (2) leather chairs;
q. White sectional couch;
r. Two (2) white living room stuffed chairs with ottomans;
s. Onyx table (tan and white);
t. Round brown table with white stone top;
u. Two (2) plastic lighters;
v. Miscellaneous potted plants;
w. Onyx serving table (with wheels);
x. White couch;
y. Dark brown onyx table;
z. Ashtrays;
aa. Wire figurine of man;
bb. Three (3) bar chairs;
cc. Two (2) glass candy containers;
dd. Green clock;

ee. Plastic fruit and vegetable decorations;
ff. Miscellaneous plates, bowls, cups, and glasses;
gg. Mirror and green stand;
hh. Two (2) horse statuettes on black base;
ii. Ice box;
jj. Square yellow table of onyx;
kk. Miscellaneous bar and kitchen chairs;
ll. Formica coffee table;
mm. Various pots, pans, and kitchen utensils;
nn. Clock in plaster frame;
oo. Warming trays;
pp. Butcher's block;
qq. Yellow Osterizer blender;
rr. Electric Oster can opener;
ss. Toaster;
tt. Coffee maker;
uu. Electric juice maker (yellow colored);
vv. Electric Oster Mixer;
ww. Yellow Iron;
xx. G.E. 2 speed washer/dryer;
yy. Kirby vacuum cleaner;
zz. Various bed pillows;
aaa. Three (3) white bedside tables;
bbb. Secretarial chair;
ccc. Brown leather chair;
ddd. Two (2) night stands;
eee. Chest of drawers (5 drawers;
fff. Brown telephone;
ggg. One (1) set of golf clubs;
hhh. Golf shoes (one pair);
iii. King size bed;
jjj. Night stand;
kkk. Chest of drawers (6 drawers);

lll. Brass chest (3 drawers);
mmm. Glass topped table with four (4) green chairs;
nnn. Miscellaneous books, excluding language and accounting books of Respondent;
ooo. Miscellaneous male clothing;
ppp. Miscellaneous male jewelry;
qqq. Pink onyx table;
rrr. Lamps;
sss. Brass pot;
ttt. Round mirror;
uuu. Linens, towels and bedspreads;
vvv. Bathroom scales;
www. Miscelaneous law furniture;
xxx. Game table and four (4) chairs;
yyy. Television set;
zzz. All personal property, furnishings, and fixtures currently located at 700 Oakmont Lane North, Fort Worth, Tarrant County, Texas which are not specifically described and granted to Respondent, Virginia Priddy, under the terms of this Judgment and Divorce Decree.

17. Personal property, furnishings and fixtures currently in the possession of H.T. Priddy and described as follows:

a. Two (2) paintings by Leonardo Neiman;
b. One (1) game table and four (4) chairs;
c. Television set;

18. Social membership to Woodhaven Country Club, Fort Worth, Tarrant County, Texas;

19. Membership to the Petroleum Club, Fort Worth, Tarrant County, Texas;

20. Five hundred (500) shares of Taylor Made Fats, Inc., representing fifty percent (50%) of the stock of such corporation as evidenced by stock certificate No. 2 dated February 7, 1972;

21. Twenty-five hundred (2500) shares of LCW Trucking, Inc., representing twenty-five percent (25%) of the stock as evidenced by stock certificate No. 2 dated April 11, 1973;

22. Twenty-five hundred (2500) shares of LCW Truck Lines, Inc., representing twenty-five percent (25%) of the common stock of such corporation as issued subsequent to incorporation in August 1973;

23. An undivided twenty-five percent (25%) interest in that certain lot, tract or parcel of land, same being all of lot four (4), block one (1), together with an undivided one-half (1/2) interest in and to the stone wall and the ground under said wall situated in the east line of lot three (3), block one (1), all situated in the town of Granbury, Hood County, Texas, according to the plat of said

town now on file in the County Clerk's office of Hood County, Texas, including all building and all improvements situated thereon, as described in that Warranty Deed recorded in volume 184, page 278 of the Deed Records of Hood County, Texas, together with a twenty-five percent (25%) interest as a partner to that partnership known as Opera West;

24. Fifty percent (50%) interest as a general partner in the partnership called Priddy-Taylor Investments, with the property of such partnership including:

    a. Note receivable from M.R. Butcher, trustee, dated September 8, 1975 in the original principal amount of $129,599.32, secured by Vendor's Lien and Deed of Trust of even date;

    b. Note receivable from M.R. Butcher, trustee, dated September 8, 1975 in the original principal amount of $57,900.67, secured by Vendor's Lien and Deed of Trust of even date;

    c. Note receivable from Barney W. Pace, Charles C. Jetton, and James Richard Gurganus, Jr., dated July 19, 1978, in the original principal sum of $38,150.00 secured by Vendor's Lien and Deed of Trust of even date;

d. Two-thirds (2/3) of a note receivable from Allen W. Cates, Jr. dated January 26, 1979 in the original principal sum of $39,908.00 secured by Vendor's Lien and Deed of Trust or even date;

e. Note receivable from P & P Auto and Truck Sales, Inc. dated June 1, 1980 in the original principal sum of $100,000.00 secured by Security Agreement-Inventory of even date;

f. Account receivable from Taylor Made Fats, Inc. to Priddy-Taylor Investments;

g. Thirty thousand six hundred (30,600) shares of Texsun Construction Company, common stock representing one hundred percent (100%) of the ownership of Texsun Construction Company, Inc. as evidenced by stock certificate number two in the amount of six hundred (600) shares issued on February 13, 1973, and stock certificate number five in the amount of thirty thousand (30,000) shares as issued on December 15, 1975;

h. One thousand (1000) shares of Texas Feed Supplement, Inc., common stock representing one hundred percent (100%) of the ownership of such corporation;

i. An undivided forty percent (40%) ownership of Nolan River Property located in Johnson County, Texas, consisting of 1,201.07 acres, more or less, out of the W. Perry Survey, as more particularly described in that Warranty Deed from Florrie Gee, Gene Gregg Meyers, E.R. Gregg, Jr., Gregg Kurth, and Melvin Kurth, to Jack M. Langdon, H.T. Priddy, A.E. Taylor, Jr., Dr. Eugene C. McDanall, and J. Harold Hughes, executed March 19, 1974, and filed in the Deed Records of John County, Texas, volume 633, page 314;

j. One (1) unit of Equipment Investors III, as evidenced by certificate of limited partnership interest executed by Polaris Investment Management Corporation, dated September 1, 1977, certificate number 21;

k. Royalty interest of one-eighth (1/8) of eight-eighths (8/8ths) per acre in Section 18, Block 1, W & NW Survey, Ward County, Texas and resulting interest in Gulf Oil Corporation, J.W. Cadenhead Lease;

l. Three thousand (3000) shares of common stock in Originala, Inc.;

m. Five thousand (5000) shares of common stock in Brodie Exploration Corporation;

n. Three hundred (300) shares of common stock of General Rail Construction;

o. Overriding royalty in the amount of one percent (1%) of eight-eights (8/8ths) in approximately 952.5 acres located in Menard County, Texas, as described in that Assignment of Overriding Royalty from Johnny L. Patton, Jr. to Priddy-Taylor Investments executed February 26, 1979, and recorded in volume 97, page 748 of the Deed Records of Menard County, Texas;

p. Overriding royalty in the amount of .0717483 of one percent (1%) of eight-eighths (8/8ths) in approximately 1,742.2 acres located in Menard County, Texas as described in that Assignment of Overriding Royalty from Johnny L. Patton, Jr. to Priddy-Taylor Investments executed April 25, 1979, and recorded in volume 97, page 879 of the Deed Records of Menard County, Texas;

q. Account receivable from LCW Trucking, Inc.;

r. Six thousand (6000) shares of common stock of Imperial Energy Corporation;

s. Five hundred (500) shares of common stock of Armaco Research.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the following debts do now and have always constituted separate liabilities of Petitioner and Petitioner shall pay, as separate debts, the following debts and obligations and shall indemnify and hold Respondent, Virginia Priddy, harmless from any failure to so discharge such debts and obligations:

1. Note payable to Southland Life Insurance Company as loan against policy number 381069 in the approximate amount of $11,852.52;

2. Note payable to Southland Life Insurance company as loan against policy number 381070 in the approximate amount of $4,471.00;

3. Note payable to Southland Life Insurance Company as loan against policy number 381071 in the approximately amount of $4,471.00;

4. Note payable to Pioneer American Insurance, in the approximate amount of $31,138.00;

5. Note payable to United Savings of Texas, formerly Mutual Savings Association, in the approximate amount of $92,471.89.

The following property is recognized as being the separate property of the Respondent and the Respondent is awarded the following as Respondent's sole and separate property, and it is hereby determined that Petitioner does not now nor has he ever had any interest in and to the following separate property of Respondent:

1] One (1) 1977 Chevrolet Monza automobile;

2] Condominium located at Avenue Copilco, No. 76, Building A-2, Apartment 603, Coyoacan, Mexico City, Mexico D.F.;

3] The following items of personal property currently located at 700 Oakmont Lane North, Fort Worth, Tarrant County, Texas:

a. Olivetti Studio 44 portable typewriter;
b. Singer Facilita sewing machine and stand;
c. Four (4) painting easels;
d. Three (3) antiquie, dark green bottles;
e. Two (2) Louis IV style lamps, navy blue and gold;
f. Set of silverware with opaque plastic handles;
g. Set of silverware with flower impressions;
h. Antique telephone;
i. Waring electric can opener (green);
j. Electric Oster mix (light green);
k. Water-Pik water filter;
l. Glass candle cover decorated with hand drawings;
m. Fourteen (14) baking trays;
n. Two (2) glass fruit plates (decorated with glass ribbing);
o. Glass oblong cooker/pot;
p. Two (2) Pyrex pots with covers;
q. Flat glass salad plate;
r. Small crystal vase (square cylindrical shape);
s. Large crystal vase (square cylindrical shape);
t. Red and black West Bend Coffee pot;
u. Appollo thermos with multi-colored flower print;
v. Dry iron;
w. One (1) black and white dot throw pillow;
x. One (1) dark brown throw pillow;

y. One (1) tan throw pillow;
z. Two (2) orange throw pillows;
aa. Seven (7) deep yellow towels with flower print;
bb. Five (5) sets of sheets with flower print;
cc. Painting of Ste. Maria Magdalena with frame;
dd. Seven (7) landscape paintings with gold colored frame and velvet border;
ee. Antique painting (no frame) of Ste. Maria Magdalena;
ff. Still-life painting with wide gold colored frame and velvet border;
gg. Large painting of Virginia Priddy and her son, Jose, with wide gold frame and velvet border;
hh. Miniature portrait painting of Virginia Priddy's son, Jose, with frame;
ii. Painting of the descension from the cross with gold colored frame;
jj. Painting of the death of Socrates with gold colored frame;
kk. Painting of a lion, with wood frame;
ll. Portrait painting of Virginia Priddy's son, Jose;
mm. Gold rose pin, natural size;
nn. Bracelet of sterling and white gold with amethyst and turquoise;
oo. Amethyst cross of white gold and silver;
pp. Ring of white gold and ten

diamonds;

qq. Cross of white gold and diamonds;

rr. Set of silk flowers in brass vase;

ss. Earrings of sterling and white gold with amethyst and turquoise;

tt. Necklace of sterling and white gold with amethyst and turquoise;

uu. Wedding ring;

vv. Gold watch;

ww. Fur jacket with leather (dark brown);

xx. Nine (9) sweaters;

yy. Ten (10) blouses;

zz. Nine (9) pairs of slacks;

aaa. Ten (10) skirts;

bbb. Five (5) dresses;

ccc. Four (4) jackets;

ddd. Two (2) evening dresses;

eee. White shawl;

fff. Twelve (12) pairs of shoes;

ggg. Three (3) black coats;

hhh. Leather coat.

4] Dark brown striped couch for four persons with two (2) matching stuffed seats;

5] One (1) onyx coffee table with gold colored legs;

6] Two (1) onyx end tables with gold colored legs;

7] Dining set consisting of six (6) can chairs, a china cabinet, and a round table with glass cover;

8] Set of white and flowered pots (3 in a set);

9] Set of three (3) white plates;

10] Cross washing machine;

11] Osterizer mixer (silver);

12] Queen size bed with headboard and end board, and matching night stand, dresser, round mirror and desk;

13] Queen size bed with headboard and end board, and matching night stand, dresser, and round mirror;

14] Hoover vacuum cleaner;

15] Two (2) full length mirrors;

16] Certificate of Deposit number 10638 at the Meadowbrook National Bank, Fort Worth, Tarrant county, Texas in the approximate amount of $5,433.75;

17] Tort claim by Virginia Priddy as severed from this cause which concerns allegations requesting damage for alleged fraud concerning Virginia Priddy's cessation of employment as Chancellor for the government of Mexico; save and except any claim for wages lost during the parties' marriage; without any determination whatsoever as to the validity or invalidity of such claims of Virginia Priddy.

Petitioner is awarded the following

as Petitioner's sole and separate property, and Respondent is hereby divested of all right, title and interst in and to such property:

1] Any and all interest in any insurance policy or policies on the life of Petitioner;

2] All wearing apparel and jewelry currently in the possession of Petitioner not specifically granted to Respondent under the terms of this Judgment and Divorce Decree;

3] All funds located in checking account number 105072 at the Texas Commerce Bank, Fort Worth, Texas;

4] All funds located in checking account number 998872 at the Texas Commerce Bank, Fort Worth, Texas;

5] 1979 Mark V automobile subject to all debts secured by such vehicle, together with all unexpired insurance on said 1979 Mark V automobile;

6] 1979 Oldsmobile Cutlass subject to all debts secured by such vehicle, together with all unexpired insurance on said 1979 Oldsmobile cutlass automobile;

7] All right, title and interst in any right of reimbursement of

the community estate for the $22,137.00 paid toward the reduction of the principal balance of the mortgage on the real property at 700 Oakmont Lane North, Fort Worth, Tarrant County, Texas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner shall pay,as a part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold Respondent harmless from any failure to so discharge such debts and obligations:

1] Account payable to Taylor Made Fats, Inc., resulting from funds advanced to parties with current outstanding balance of approximately $129,120.00;

2] Note payable to the Bank of Crowley, Texas, for purchase of 1979 Mark V with current outstanding balance of approximately $8,159.00;

3] Note payable to Bank of Crowley, Texas, for the purchase of 1979 Oldsmobile Cutlass, with current outstanding balance of approximately $4,720.00;

4] 1980 Federal Income Tax liability of Petitioner;

5] All debts incurred by the Petitioner since the parties' separation on October 26, 1979.

Respondent is awarded the following as Respondent's sole and separate property, and Petitioner is hereby divested of all right, title and interest in and to such property:

1] Any and all interest in any insurance policy or policies on the life of Respondent;

2] All funds located in checking account number 399188 at the Fort Worth National Bank, Fort Worth, Texas;

3] All funds located in the savings account number 039727 at the Fort Worth National Bank, Fort Worth, Texas;

4] 1979 Federal Income Tax refund check currently in the possession of the Respondent in the amount of $11,743.00;

5] Paintings owned by Virginia Priddy other than those owned by Virginia Priddy prior to her marriage to H.T. Priddy;

6] All wearing apparel and jewelry currently in the possession of Respondent not specifically

granted to Petitioner under the terms of this Judgment and Divorce Decree;

7] Set of golf clubs in Virginia Priddy's possession;

8] Pair of golf shoes in Virginia Priddy's possession;

9] Miscellaneous language and accounting books of Virginia Priddy;

10] One dog;

11] One (1) pair of earrings;

12] One (1) necklace;

13] All unexpired insurance on that 1977 Chevrolet Monza recognized as being separate property of Respondent.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondent shall pay, as a part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold Petitioner harmless from any failure to so discharge such debts and obligations:

1] All debts incurred by Respondent since the date of the parties' separation on October 16, 1979,

including but not limited to, all borrowing of funds, use of credit cards, and use of charge accounts, save and except those debts specifically ordered to be paid by Petitioner in this Judgment and Divorce Decree and save and except those debts specifically ordered to be paid by Petitioner in the Temporary Orders prior to their expiration as stated herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court's temporary orders shall and do in all respects expire as of the date of the signing of this Judgment and Decree of Divorce, save and except that Respondent's right of the use and possession of the residence, lot, house, furniture, furnishings, appliances, and household items located at 700 Oakmont Lane North, Fort Worth, Tarrant County, Texas, shall continue for a period of fourteen (14) days immediately following the signing of this Judgment and Decree of Divorce. However, such right to use and

possession of the residence, lot, house, furniture, furnishings, appliances, and household items located at 700 Oakmont Lane North, Fort Worth, Tarrant county, Texas, shall expire upon the expiration of fourteen (14) days after the signng of this Judgment and Decree of Divorce, and Virginia Priddy is hereby ORDERED to vacate the premises prior to the expiration of such fourteen (14) days after the signing of this Judgment and Decree of Divorce, and to leave in good condition all those items of property awarded to Petitioner herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party shall his or her own attorneys' fees incurred in this cause, save and except that it is ORDERED, ADJUDGED AND DECREED that Respondent shall pay to Petitioner the amount of $195.00 as previously ordered

in this Court's Order of Protection entered by this Court and signed on September 4, 1980.

IT IS FURTHER ORDERED, AJDUGED AND DECREED that Petitioner and Respondent shall execute all instruments necessary to effect this decree and that Petitioner and Respondent shall have appropriate and necessary writs, execution, and process, as many and as often as is necessary to accomplish the execution and final disposition of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court expended in this cause over and above deposits made herein, are assessed against the party incuring same, and that each party to this cause shall pay all deposition expenses and any and all other costs and expenses incurred by such party.

IT IS ORDERED, AJDUDGED AND DECREED that the judgment as stated herein takes into consideration all relief requested in this cause, and any such relief not herein granted, is hereby denied, including, but not limited to, any and all requests by Respondent for alleged reimbursement, alleged damages for fraud, and/or alleged damages resulting from intent to injure the rights of Respondent.

SIGNED this 11th day of December, 1980.

/s/ Harold L. Valderas
JUDGE PRESIDING

APPROVED AS TO FORM:

McDONALD, SANDERS, GINSBURG,
PHILLIPS, MADDOX & NEWKIRK

By /s/ Rick G. Sorenson
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Office - Supreme Court, U.S.
FILED
JUL 27 1982
ALEXANDER L. STEVAS, CLERK

No. 81-2397

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VIRGINIA PRIDDY, *Petitioner*

v.

H. T. PRIDDY, *Respondent*

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Texas

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QUESTIONS PRESENTED

1. Whether the Trial Court's decision not to grant Petitioner an interest in Priddy-Taylor Investments, a partnership formed by Respondent more than seven years prior to the parties' marriage and whose market value had not increased during the parties' marriage, resulted in the Petitioner being denied due process of law or the equal protection of the laws.
2. Whether the just and right division of the estate of the parties by the Trial Court which was supported by ample evidence resulted in the Petitioner being denied due process of law or the equal protection of the laws.

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No. 81-2397

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

VIRGINIA PRIDDY, *Petitioner*,

H. T. PRIDDY, *Respondent*.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Texas

Respondent respectfully prays that the writ of certiorari be denied, and that the just determinations of the State Courts stand.

STATUTORY PROVISION INVOLVED AND NOT STATED BY PETITIONER

Texas Family Code, Section 5.01:

"(a) A spouse's separate property consists of:

(1) the property owned or claimed by the spouse before marriage . . ."

STATEMENT OF THE CASE

This statement of the case as herein presented by Respondent, H. T. Priddy, is necessary to fairly present the facts to the Honorable Supreme Court of the United States.

This is a divorce and marital property division case. Trial was to a jury which found that Respondent owned certain property as his separate property, and that Priddy-Taylor Investments, a partnership between A. E. Taylor and Respondent, existed prior to the parties' marriage (Tr. 137, 143-149). The jury found that, as of trial, $331,172 of capital contributions made by Respondent to Priddy-Taylor Investments during the parties' marriage had not benefited the partnership (Tr. 151-152). The Trial Court entered a Judgment and Decree of Divorce dividing the property at issue and denying Petitioner's reimbursement claims (Pet. App. D). Petitioner appealed, and the Court of Appeals affirmed the Trial Court and overruled Petitioner's seventy-two (72) points of error (Pet. App. C). On February 24, 1982, the Texas Supreme Court dismissed Petitioner's Application for Writ of Error for Want of Jurisdiction (Pet. App. A-1).

Parties

Petitioner and Respondent were married on December 24, 1977 (R. 4). *Approximatley eighteen (18) months later, Respondent filed for divorce on June 8, 1979 (Tr. 2)*, based upon the grounds of insupportability and Petitioner counterpetitioned (Tr. 8). The parties stipulated to such insupportability (R. 614-615).

Respondent, a male, was sixty-three years old at the time of trial, and has no more than a seventh grade education (R. 7). He has worked continuously since the approximate age of twelve (12) (R. 7), but has no pension plan or guaranteed retirement income plan (R. 654).

Petitioner at the time of trial was thirty-six years old. During the parties' marriage Respondent supported both Petitioner and her son by a prior marriage (R. 515). Petitioner is a high school graduate and has also completed a year of law school in Mexico (R. 519), Bernard Secretarial School (R. 519), a one-year art class (R. 520-521), and numerous English classes (R. 521, 522-524). Petitioner has worked as a secretary and as an art teacher (R. 525).

Petitioner did not work from the time of the parties' marriage up until the date of the trial (R. 518). She attended school throughout the parties' marriage (R. 581), with such schooling being paid for by Respondent (R. 34) and including courses in reading and English grammar at Tarrant County Junior College (R. 522-523), courses in grammar, typing, shorthand, spelling, filing and accounting at the Fort Worth School of Business (R. 523), English courses at the Berlitz School of Languages (R. 524), and business courses at the Hardwick School of Business (R. 524).

At the time of trial, Petitioner made numerous allegations to the jury concerning the alleged misdeeds of Respondent (R. 586-593), and Respondent stated that the allegations were false (R. 645-646). Petitioner's alleged cause of action for fraud concerning Petitioner's quitting her secretarial job (R. 528) has been severed

from this case (Tr. 85-86; Supp. Tr. 22). Petitioner's allegations concerning fraud were contradicted (R. 33).

Property

Respondent, in his sixty years prior to his marriage to Petitioner, accumulated interests in several corporations and partnerships, including Taylor Made Fats, Inc., LCW Trucking, Inc., LCW Truck Line, Inc., and Priddy-Taylor Investments (R. 19-20). For brevity, the properties of the parties will not all be discussed in detail, but it should be noted that the Judgment and Decree of Divorce (Pet. App. D) was a culmination of a jury trial beginning October 2, 1980 and ending October 21, 1980 (R. 1-803; Tr. 163), involving lengthy testimony from the parties and accountants, and submission of over 110 exhibits concerning the financial condition of the various entities including Priddy-Taylor Investments (PX 43-45, 47-49).

Based upon the evidence, in the opinion of Ronald Coulson, C.P.A., the fair market value of Taylor Made Fats, Inc. decreased during the parties' marriage (R. 472), and the fair market value of LCW Trucking, Inc. and LCW Truck Line, Inc., inactive businesses, did not increase during the parties' marriage (R. 354-355, 472-475).

Priddy-Taylor Investments, a partnership created on May 5, 1970 (PX 42; R. 251), has always been a 50/50 partnership between Respondent and A. E. Taylor, Jr. (R. 228). Priddy-Taylor Investments had losses totalling $215,000 in 1977, $147,000 in 1978, and $208,000 in 1979 (R. 436-439; PX 48). Ronald Coulson, C.P.A., testified

that the partnership equity of Priddy-Taylor Investments had a real decrease of $41,021 during the parties' marriage (PX 59; R. 467-468), and that the fair market value of Priddy-Taylor Investments did not increase during the parties' marriage (R. 477). The jury found that during the parties' marriage $331,172 was made as a capital contribution to Priddy-Taylor Investments by Respondent (Tr. 151), and that at the time of trial, the benefit of such capital contribution had been lost (Tr. 152-Issue 12).

Respondent under the terms of the Judgment and Decree of Divorce is expressly obligated to pay $144,404.41 in debts originating prior to the parties' marriage (Tr. 8; R. 59-61, 118-119, 254-261, 297, 332-333), and this liability figure does not take into consideration approximately $190,227 in current liabilities of Priddy-Taylor Investments stated in the balance sheet of December 31, 1979 (PX 54). When the gross community debt is added to the separate liabilities of Respondent, Respondent is required to satisfy $286,403.41 in liabilities. In contrast, Petitioner was only required to pay those debts incurred by her after the parties' separation (R. 174; Tr. 174).

SUMMARY OF ARGUMENT

The just and right division of the properties of the parties properly included the granting to Respondent of a 50% interest in Priddy-Taylor Investments which had been owned by Respondent since seven years prior to the parties' marriage and which did not increase in value during such marriage.

ARGUMENT

Respondent asserts that the decisions of the Texas Courts involved in this case were correct in all respects. However, in response to the Petition for Writ of Certiorari at issue, it should be noted that ". . . [a] review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. . ." S. Ct. Rule 17.1. A merely erroneous decision given by a State Court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Ry. Express Co. v. Commonwealth of Kentucky*, 47 S. Ct. 353, 355, 273 U.S. 269, 273, 71 L. Ed. 639, 641 (1927). The opinions of this Court suggest that the sole basis for disregarding an independent state substantive ground as inadequate is that it represents an effort to evade the command of federal law. Wright, Charles A., *Federal Practice and Procedures: Jurisdiction* §4029 (1977) citing *Demorest v. City Bank Farms Trust Co.*, 64 S. Ct. 384, 388, 321 U.S. 36, 42-43, 88 L. Ed. 526, 530 (1944). As indicated by the ensuing text, the divison of the estate of the parties in a divorce proceeding is the role of the State, and the division at instance is fully supported by Texas precedent, and resulted in a "just and right" division of the estate of the parties.

I. The Partnership as Separate Property

Petitioner complains of the awarding of a 50% undivided interest in the Texas partnership of Priddy-Taylor Investments to Respondent. The Texas Legislature recognizes that a spouse's separate property consists of

". . . the property owned or claimed by the spouse before marriage." TEX. FAMILY CODE ANN. 5.01(a) (1) (1975). Priddy-Taylor Investments is by the undisputed evidence produced at trial, a partnership of which Respondent has had a 50% interest since 1970 (PX 42; R. 228). Therefore, Respondent's 50% interest in Priddy-Taylor Investments was entitled to be classified as separate property. His undisputed inception of title in Priddy-Taylor Investments prior to marriage is the determining factor. Cf. *Dakan v. Dakan*, 83 S.W.2d 620, 627 (Tex. 1935).

The Texas Supreme Court has recognized that an interest in a partnership acquired prior to marriage by one spouse retains its separate nature during the marriage. *Norris v. Vaughan*, 260 S.W.2d 676, 681 (Tex. 1953). This recognition of the separate property characteristic of the partnership interest acquired prior to marriage conforms with the entity theory adopted by the Texas Uniform Partnership Act. TEX. REV. CIV. STATS. ANN. ART. 6132(b) *et seq* (1970), Art. 6132(b) §1, §25 (1970), Source and Comments — Alan R. Bromberg, pp. 300, 358.

A principal method of rebutting the presumption that all property acquired during marriage is community is a showing that the property was acquired prior to marriage. McKnight, Joseph W., *Family Law: Husband and Wife*, 35 SWLJ 93, 103 (1981). Since the partnership entity, Priddy-Taylor Investments, has been shown as an item of property owned prior to the marriage, a problem of tracing does not arise. See *Smoot v. Smoot*, 568 S.W.2d 177, 181 (Tex. Civ. App. — Dallas 1978, no writ).

The question before the Texas Courts was the manner in which to handle the capital contributions paid to Priddy-Taylor Investments to improve that partnership during the parties' marriage. The proper means of handling payments by the community estate to Priddy-Taylor Investments was for Petitioner to request reimbursement to the community estate from Respondent's separate property interest in Priddy-Taylor Investments; a request made in Petitioner's pleadings (Tr. 55).

Where community funds are expended for the improvement of a spouse's separate property, the measure of recovery is either the amount of the enhancement of the value of the separate property by virtue of the improvements determined at the time of partition, or the amount of community funds expended for the improvements, whichever is the lesser. *Texas Family Law, Fifth Edition*, Loy M. Simpkins, Section 22:38, page 504. As stated by the Fort Worth Court of Civil Appeals in *Davis v. Davis*, 108 S.W.2d 681, 687 (Tex. Civ. App. — Fort Worth 1937, no writ) ". . . [R]egardless of the amount of the advancement which is traced into the improvements of the *specific* property, the amount to be allowed upon partition is still further limited to the amount of enhancement in value of the improved property, due to the advances, *which still exist at the time of the partition.*"

Petitioner failed to establish a right of reimbursement. Priddy-Taylor Investments lost a total of $335,000 in 1978 through 1979 (PX 48; R. 436-440). LCW Trucking, Inc., a non-operating corporation, owes Priddy-Taylor Investments in excess of $250,000 which it cannot repay (R. 130-131, 354, 383-385). The real book value of Priddy-Taylor Investments has decreased since December 31,

1977 (PX 59; R. 467-469). The fair market value of Priddy-Taylor Investments did not increase during the parties' marriage (R. 476-477). The jury was certainly justified in finding at the time of trial that Petitioner failed to prove that Priddy-Taylor Investments was benefited or improved by the capital contributions during the parties' marriage (Tr. 152-Issue 12).

The Texas Supreme Court in denying Petitioner's Application for Writ of Error for Want of Jurisdiction (Pet. App. A-2), correctly recognized that the lower court opinion in this case (Pet. App. C) is not in material conflict with *Cox v. Cox*, 439 S.W.2d 862 (Tex. Civ. App. — San Antonio 1969, no writ), nor *Smoot v. Smoot*, 568 S.W.2d 177 (Tex. Civ. App. — Dallas 1978, no writ). Article 1728 Tex. Rev. Civ. Stats. Ann. (1964).

In order for there to be a conflict which would give rise to appellate jurisdiction in the Texas Supreme Court, the conflict must be such that one decision would operate to overrule the other in case both were decided by the same court. *John Farrell Lumber Co. v. Wood*, 400 S.W.2d 307, 308 (Tex. 1966). The case presently before the court is certainly not the same state of facts as appeared in *Cox v. Cox, supra. Cox* dealt with a finding by a trial court that the Cox partnership was totally separate property when the spouse claiming the partnership as separate property did not even submit pleadings in support of the contention that separate property existed. Respondent, H. T. Priddy, filed and submitted pleadings in support of his assertions of the existence of separate property (Tr. 2, 5; supp. Tr. 14). Furthermore, *Cox* did not involve a partnership which was created more than seven years before the parties' marriage. In this case, unlike *Cox*,

Respondent established the decline in the value of Priddy-Taylor Investments during the parties' marriage (e.g., PX 48, 59; R. 436-440; PX 46; R. 383-385, 437-438, 467-469; 476-477).

Likewise, it should be noted that *Smoot v. Smoot*, 568 S.W.2d 177 (Tex. Civ. App. — Dallas 1978, no writ) is a case wherein the principal asset listed as separate property of the Appellee was an undivided one-half interest in land which was given to the Appellee as his separate property and placed in the Smoot & Son partnership. Smoot & Son was completely capitalized by gifts to Appellee, without community contribution, and at the time of trial the principal asset of such partnership was the land donated to the partnership as a gift to the Appellee. *Smoot v. Smoot, supra*, at 179. The Dallas Court of Civil Appeals merely affirmed the Trial Court's holding that the Appellee's interest in Smoot & Son was his separate property to the extent of the value of the land which was placed in the partnership as a gift to him, and which remained in the partnership. *Smoot v. Smoot, supra*, at 181. Neither the *Smoot* facts nor the *Cox* facts are the "same state of facts" as exist in this case, and consequently, jurisdiction in the Texas Supreme Court was not invoked. *John Farrell Lumber Co. v. Wood*, 400 S.W.2d 307, 308 (Tex. 1966).

II. The Ultimate Determination: The Division of the estate was just and right.

As stated in the TEXAS FAMILY CODE §3.63 (1975), "In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the

rights of each party . . ." Since the issue on appeal is the manner in which the property owned by the parties was divided, the judgment of the trial court will be reversed only when there is a clear abuse of discretion. *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974). "The fact that a trial judge may exercise his discretional authority in a matter differently than an appellate judge would have done under similar circumstances, does not demonstrate that an abuse of discretion has occurred." *Musslewhite v. Musslewhite*, 555 S.W.2d 894, 897 (Tex. Civ. App. — Tyler 1977, writ dism'd).

The division of the property in this case was a "just and right" division giving due regard for the rights of each party. Neither the fair market value of Taylor Made Fats, Inc., LCW Trucking, Inc., LCW Truck Lines, Inc., nor Priddy-Taylor Investments increased during the parties' marriage (R. 471-477). The net book value of the assets of Respondent decreased by $124,377 from December 31, 1977 to December 31, 1979 (R. 464-465).

As stated, the Trial Court correctly classified Priddy-Taylor Investments as the separate property of Respondent. The fact that certain property may have been mischaracterized does not alter the fact that division of the property must be presumed "just and right," unless otherwise established by the Petitioner. Petitioner has failed to satisfy this burden. Consequently, any conflicts which might exist between the opinion of the Court of Appeals in this case and the opinions in *Cox v. Cox*, *supra*, and *Smoot v. Smoot*, *supra*, are inconsequential, and are not, upon a question of law "material to a decision in this case." Therefore, the Texas Supreme Court had no jurisdiction of the case, and it was unnecessary to

decide whether the asserted conflict actually existed. *Williams v. Williams*, 325 S.W.2d 682, 684 (Tex. 1959). In order for the Texas Supreme Court to have jurisdiction on the basis of conflicting decisions, the conflict must be upon a "question of law material to the decision of the case." In order to be material to a decision of the case, the question of law must be such that "a decision thereof will . . . necessarily control the disposition of the case." *Id.*

The bottom line in this case is that Petitioner is better able to make a living today than she was at the time she was married as the result of extensive education provided by Respondent. The business entities owned by Respondent prior to his marriage are worth no more today than they were at the time of the parties' marriage. Any income enjoyed by the parties during the parties' marriage arose from the efforts of Respondent in conjunction with business enterprises begun by Respondent prior to his marriage. Respondent has been required to discharge $286,403.41 in debts ($141,999 of which represents community debts), as well as his 1980 income tax liability, and partnership liabilities, while Petitioner is only obligated to pay debts incurred by her since the parties' separation (Pet. App. D).

In short, the decisions of the Texas Courts at issue were not erroneous, and even if erroneous did not deny Petitioner of equal protection of the laws nor of property without due process of law. Most certainly, if any error did exist, it did not constitute an effort to evade the command of federal law. See *American Ry. Express Co. v. Commonwealth of Kentucky*, 47 S. Ct. 353, 355, 273 U.S. 269, 273, 71 L. Ed. 639, 641 (1927) and *Demorest v.*

City Bank Farmers Trust Co., 64 S. Ct. 384, 388, 321 U.S. 36, 42-43, 88 L. Ed. 526, 530 (1944).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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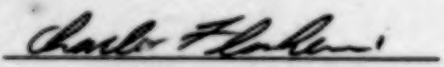
By: 

Charles Florsheim

Attorneys for Respondent,
H. T. Priddy.

CERTIFICATE OF SERVICE

I, Charles Florsheim, a member of the United States Supreme Court Bar, do hereby certify that on the 22nd day of July, 1982, three copies of the Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Texas in this cause was served upon Petitioner in accordance with the rules of this United States Supreme Court by depositing same in a sealed envelope, postage prepaid, certified mail, return receipt requested, addressed to Edwin Tobolowsky, Esq., Tobolowsky & Schlinger, P.C., 1900 Southland Center, Dallas, Texas, 75201, counsel of record for Petitioner, Virginia Priddy. I further certify that all parties required to be served have been served.

Charles Florsheim